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MICHAEL E. BORDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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In his memorandum in opposition, respondent Murphy suggests that there were no exigent circumstances in the present case justifying the immediate taking of scrapings from underneath his fingernails, because, *inter alia*, there is nothing in the record which indicates that the evidence in question was in the course of destruction (Memorandum, at 2). This suggestion is refuted by the trial testimony of the deputy district attorney who was present at the time the evidence in question was taken, concerning Murphy's actions immediately after permission was sought to take the scrapings.

“(Whereupon the reporter read back as follows:

‘Question—And were you present when the request for fingernail scrapings was made?

‘Answer—Yes, I was present at that time.’)

“Q [by the prosecutor] Could you see the defendant at that time?

“A Yes, I could.

“Q What did he do when that request was made?

“A Immediately after the request was made, the defendant put both hands behind his back at that time.

“Q Can you stand up and demonstrate to the jury what he did?

“A Yes (complying). He was standing somewhat in this manner. And, immediately upon the request, his hands went behind his back in this fashion (indicating).

“Q Could you see any movement or anything of that sort?

“A Yes, he—his shoulders and the parts of his arms that I could see at that time were both moving in a fashion such as this (indicating).

“Q Did he do anything else with his hands while they were there?

“A Yes. Now, that occurred for a period of time. And then his hands then went into his pockets, one into—went into each of his front pockets of his trousers in that fashion (indicating). At that time I could hear a metallic sound, such as keys or change rattling.” (Ex. 1 (Tr. of state court trial), at 311-312).

Respondent Murphy also suggests that under the circumstances of this case, he should, at most, have been formally detained at the police station while the police

applied for a search warrant (Memorandum, at 2). The impracticability of this suggestion under the circumstances presented here was correctly analyzed by the Oregon Court of Appeals when it affirmed Murphy's conviction. The final paragraph of that court's opinion points out the abnormal degree of restraint which would have had to be placed on Murphy throughout any such detention, if such highly perishable evidence as fingernail scrapings was to be preserved, and properly holds that the immediate taking of that evidence was more reasonable and, indeed, preferable under the Fourth Amendment.

"Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. * * *" *State v. Murphy*, 2 Or. App. 251, 260, 465 P.2d 900, 904-905, cert. denied 400 U.S. 944 (1970).

Respectfully submitted,

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